Petition

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In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES E. HERNANDEZ, APPELLANT

V.

THE LAFAYETTE, LOUISIANA AND THE CITY COUNCIL OF LAFAYETTE, LOUISIANA, APPELLEE.

ON APPEAL FROM THE THIRD CIRCUIT COURT OF APPEAL IN AND FOR THE STATE OF LOUISIANA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY THE APPEAL

1. MAY A MUNICIPALITY REPEATEDLY REFUSE A REQUEST FOR A ZONING CHANGE BASED ON ITS DESIRE TO HOLD DOWN THE VALUE OF SUCH PROPERTY IN ANTICIPATION OF A FUTURE EXPROPRIATION PROCEEDING WITHOUT VIOLATING THE 14TH AMENDMENT TO THE UNITED STATES CONSITUTUION?

2. DOES THE ZONING ORDINANCE OF THE CITY OF LAFAYETTE, LOUISIANA, AS APPLIED TO THE PROPERTY OF JAMES E. HERNANDEZ DENY HIM A REASONABLE RETURN OR REASONABLE USE OF HIS PROPERTY, THEREBY DEPRIVING HIM OF PROPERTY WITHOUT JUST COMPENSATION AND DUE PROCESS OF LAW IN VIOLATION OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

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THE OPINIONS BELOW

The Supreme Court of the State of Louisiana denied Mr. Hernandez's application for certiorari or writ of review to the Court of Appeal, Third Circuit on June 22, 1981, making the judgment of the Third Circuit Court of Appeal a final judgment or decree rendered by the highest court of the State of Louisiana in which a decision could be had and therefore appealable to the Supreme Court of the United States. The written denial is noted at_____So. 2d_____(La. 1981). The judgment of the Third Circuit Court of Appeals for the State of Louisiana, which dismissed James E. Hernandez's suit against appellees seeking declaratory and injunctive relief and reversed the judgment of the 15th Judicial District Court in and for the Parish of Lafayette, State of Louisiana, was rendered on March 26, 1981 and is reported at 399 So. 2d 1179 (La. App., 1981). Appellant's timely application for a rehearing in the Third Circuit Court of Appeal was filed on April 23, 1981 and denied on May 8, 1981.

The judgment of the 15th Judicial District Court in and for the Parish of Lafayette, State of Louisiana, was rendered on June 25, 1980 and is unreported.

A copy of the writ denial of the Supreme Court, the opinion of Third Circuit Court of Appeal, and the opinion of the 15th Judicial District Court is included herein within the Appendix.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

This is a suit for declaratory and injunctive relief by a landowner who has attempted since 1975 to have his undeveloped property zoned by the City of Lafayette, Louisiana from a classification which allows only limited residential development (R-1-A) to either a multi-family residential classification (R-2), a medical office classification (B-1-M) or a limited business classification (B-1-0). Appellant contended below that the refusal to rezone his property was based on a scheme by city officials to freeze the property value of his land so that the City of Lafayette would have to pay less for the anticipated expropriation of that property in conjunction with a long planned capital improvement project. This project involved the realignment of a major thoroughfare in the City of Lafayette, Louisiana, West Bayou Parkway, and Gerard Park Drive. Plans obtained from the City of Lafayette clearly showed that the configuration of the improvement project would require expropriation of segments of land belonging to Mr. Hernandez. Appellant also contended below that due to the physicial characteristics of the subject property, the high intensity surrounding uses, the high traffic volume at the intersection where the property is located and the "spectre" of the anticipated expropriation, the property was rendered totally useless under its existing classification.

In spite of a last second attempt to salvage the litigation by repealing the capital improvement

project in toto (a maneuver which testimony has clearly shown was undertaken because the City had been advised by its attorneys that it would lose the zoning litigation if it did not do so), the District Court ruled in favor of Appellant. The Court found that Appellant had been deprived of all reasonable use of his property by the refusal to rezone it and also that the City had clearly violated Mr. Hernandez's constitutional rights under the 5th and 14th Amendments to the United States Constitution by it's scheme to use zoning as a tool to keep down prices for the planned future expropriation. Written reasons for the ruling were assigned on June 9, 1980 and the judgment was signed on June 25, 1980.

The City appealed this judgment to the Third Circuit Court of Appeal for the State of Louisiana. The Appellate Court reversed the opinion of the trial court on March 26, 1981. A timely application for rehearing asking the Court to specifically address the Constitutional questions raised by the City's conduct regarding the scheme to freeze property values, filed on April 23, 1981 was denied without written reasons on May 8, 1981. Appellant's application for writ of certiorari or review was timely filed with the Louisiana Supreme Court on June 5, 1981 and denied without written reasons on June 22, 1981. Appellant's Notice of Appeal to the United States Supreme Court was filed with the Third Circuit Court of Appeal on July 22, 1981.

This appeal is taken pursuant to the provisions of 28 USCA Sec. 1257 (2). Cases supporting the exer-

cise of this Court's jurisdiction are as follows:

Village of Euclid vs. Ambler Realty Company, 272 U.S. 365, 71 L.Ed.2d 303, 47 S.Ct. 114 (1926)

Erzonoznik vs. City of Jacksonville, 422 U.S. 205, 45 L.Ed.2d 125, 95 S.Ct. 2268 (1975)

Penn Central vs. City of New York, 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978)

Agins vs. City of Tiburon, 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980)

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The validity of the Zoning Ordinance of the City of Lafayette, Louisiana, as applied to the property of Appellant is here involved. The pertinent text of the ordinance (Ordinance No. 0-191 of the City of Lafayette, Louisiana) is included in the Appendix to this Jurisdictional Statement.

The application of the ordinance is challenged under the 5th and 14th Amendments to the Constitution of the United States. Their provisions are set forth in full as follows:

> AMENDMENT V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the

land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case involves an attempt by a fifty (50) year old music instructor with congenital cataracts and polio to have his 16.7 acre undeveloped tract of land zoned from single-family residential (R-1-A) to some zoning classification which will allow him a reasonable use of his property. Additionally, it involves an attempt by the City of Lafayette, Louisiana to use its power to zone as a tool to either freeze property values on Appellant's tract or to extract

from him cheaper prices for the tract as a prelude to an expropriation which would be required for the City's proposed capital improvement project aligning two throughfares within the City of Lafayette, Louisiana.

Trial was held on January 3rd and 4th and February 6th through 8th, 1980. Appellant's various petitions clearly alleged federal constitutional violations of his 5th and 14th Amendments rights by virtue of the City's attempt to utilize the zoning power to extract from Appellant cheaper rights-of-way over his property and additionally, by application of the ordinance to plaintiff's property depriving him of any economically viable use of his land. The trial court ruled in favor of plaintiff. The Court found that maintenance of the R-1-A classification on the subject property was arbitrary, capricious and unreasonable leaving plaintiff with no economic use of his property. Most significantly, the trial court found the concerted actions of the defendants, which included admissions by council members regarding the unconstitutional purpose behind the refusal to rezone the property, and the blatant attempt to defeat judicial review of their actions by repealling the ordinance of necessity for the realignment project so the project could be "re-evaluated" showed a scheme by which the City planned to take Mr. Hernandez's property through zoning. Defendants own attorneys had advised them that their actions were absolutely indefensible given the presence of the realignment project. For no other reason than to hurt Mr. Hernandez and to win a lawsuit, the City repealed what was described by its own officials as the *most justified capital improve-*

ment project in the history of the City of Lafayette. In sum, the Mayor and the City of Lafayette ignored the advise of its local zoning experts for five (5) long years, refusing to rezone on the property in order to make good the Mayor's threat to Mr. Hernandez "*I am going to get you.*"

Mr. Hernandez's initial attempt to have his property rezoned to medical offices (B-1-M) was unanimously approved by the professional staff of the Planning Commission. (Tr. 1236-1238). Mr. Hernandez later learned however, that the Planning Commission itself would vote not to rezone the property because the City would be putting a road through the middle of his home and property. (Tr. 1383). The Planning Commissioner Director at that time felt that a B-1-M classification would be the best one for the subject property. (Tr. 1240). In February of 1976, a member of the Lafayette City Council, now Council President Benny Ritchey, stated:

"If we change the zoning to another classification, *we are going to have to pay more money when we create the right-of-way.*" (Tr. 1174, 1201, 1202).

Plaintiff tried to have his property rezoned to R-2 (multi-family) in August of 1977. Again, the City and its Council expressed an interest in the viability of the realignment project as it affected Mr. Hernandez's petition for rezoning. After many delays, the Council upheld planning commission action which deleted Mr. Hernandez's second rezoning request from a comprehensive public hearing sched-

uled in February of 1978 basing its action on its decision to postpone any final decision on the rezoning classification until the City had determined the route of the proposed realignment project. (Tr. 1142).

At this point in time, Mr. Hernandez's plight has been characterized by the 5th Circuit of Appeal in its opinion in conjunction with Appellant's action for damages filed in Federal Court:

> After attempting to obtain a change in zoning for two and one-half years and believing no zoning change would be forthcoming until the City had acquired a right-of-way over his property at either R-1-A prices or as a part of a concession by him in return for the desired zoning classification, the plaintiff, on February 3rd, 1978, filed suit in the State Court for a mandatory injunction to compel the City to change the R-1-A zoning classification on his property. On February 21st, the City Council voted to rezone the Hernandez property to R-2. The Mayor, however, vetoed this measure and the Council failed to override the Mayor's veto. In January of 1979 the City attorney began negotiations with the plaintiff to settle the pending lawsuit in State Court, which was set for trial on February 7, 1979. *Hernandez vs. City of Lafayette, et al*, 643 F. 2nd 1188, 1191 (5th Circuit 1981).

Those negotiations were begun by the City in January of 1979. Counsel for the defendants at the time, Mr. Ronald Judice, was instructed to secure financial concessions from Mr. Hernandez prior to any approval of asettlement agreement. Mr. Judice had

explained to the Commission, the Council and the Mayor in correspondence dated February 5, 1979, the factors which compelled him to recommend to the Council that the litigation be concluded on amicable basis. He advised the Council and the Mayor that in light of all the facts and circumstances:

> "It was (his) opinion that a lengthy and costly trial of the zoning litigation would probably have resulted in a decision adverse to the City of Lafayette with respect to the propriety of continued R-1-A zoning." (Tr. 635 636).

The Mayor and the Council all signed a letter giving their *approval* to the terms of the settlement and authorized Mr. Judice to formalize the agreement. (Exhibit P-22). Mr. Hernandez upset the imminent trial date scheduled for February 7, 1979. On March 6, 1979 Mayor Bowen *refused* to sign the formal compromise which had been prepared.

Mr. Hernandez again went before the Council, now seeking a B-1-0 classification. The Council granted the application by a three-to-two vote. Mayor Bowen again vetoed the ordinance and the Council failed to override the veto.

With a new trial date set for January 3, 1980, Counsel from Chicago, Illinois was retained.

On September 28, 1979 the Mayor asked the City Council to repeal the ordinance declaring the realignment project at public necessity. The Mayor asked the Council to repeal the ordinance of necessity

for a public improvement project which only two months before had been described by the capital improvements supervisor for the City as the *most justified* project in the City of Lafayette's history. Although the May or stated publicly that there were "new facts" which showed that the project was no longer "a present necessity," in response to the subpoena duces tecum to produce all written documentation which indicated such new facts, the only document produced was a substantially blacked out letter from a New Orleans land use planner retained by counsel for the defendants, Dr. Ralph Thayer. (Exhibit P-19). The unexpunged copy of the letter which was later secured in no uncertain terms told the defendants that if they did not cancel the realignment project he, as an expert in land use, would not be able to support the R-1-A classification:

> At this time, I am at a crossroads on this issue. I am quite sure this case is heavily politically motivated and has much less to do with support of good planning. But the injection of the realignment knocks that calculation into a cocked hat for me. The two, as depicted, are not compatible and I would be compelled to say this if queried. (Though I would not volunteer it). Given the circumstances, my decision to continue participation must, for personal and professional reasons, be predicated on the willingness of Mayor Bowen to publicly withdraw or otherwise remove the alignment question from the issue. He may be unwilling to do so but I fear -- and I will not discuss this beyond us --that he is trying to hurt the Hernandez family for whatever reason by giving a zoning classification he feels inappropriate once the road is in place. Since R-4 and B-1-0 would be

> more appropriate for the two parcels after the realignment, I would only be willing to defend R-1-A given no realignment. Absent that, I simply cannot defend his action nor do, I believe it either good planning or in Lafayettes best interest. (Exhibit P19).

Council President Pat Calais testified that even though the City's prior experts felt that the project was a necessity for the City, the Council would go along with repealing the ordinance authorizing the realignment due to the fact that their attorneys from Chicago had advised that *not to repeal the ordinance could place the City of Lafayette in jeopardy with regard to pending zoning litigation!* (Exhibit P-18). Councilman Ritchey voted to abandon the project without any new planning advice! The proposal to abandon the realignment came from Mr. Siemon, the City's attorney. (Tr. 1212). Councilman Ritchey sought no documents or proposals concerning the proposal to abandon the realignment. (Tr. 1213). Mr. Ritchey was told that if the City stayed with the realignment project they had a substantial chance of losing the zoning litigation. (Tr. 1219).

When pieced together the puzzle becomes clear: *Mr. Hernandez was being blackmailed by the City to get his land at cheap prices.*

The case was also considered by the learned trial judge in a "pure" zoning context. The Court found the property to be part of Lafayette's South College Road neighborhood, an area which is undisputedly business in nature. It is noted that the defendants also considered the property as part of the

South College Road area *prior* to the issue of neighborhood becoming an important one in this litigation (Exhibit P-8). The property has frontage on West Bayou Parkway and also on South College Road. The Court found that West Bayou Parkway was an arterial thoroughfare. *Before* its becoming an issue in the lawsuit, the City had also considered West Bayou Parkway as an arterial. (Exhibit p.7). There is property directly across West Bayou Parkway from the property which is zoned R-2 and in fact apartments are to be constructed on that site. (Tr.1111). The subject property also is directly adjacent to the access road of one of the largest sewerage treatment plants in the City of Lafayette. (Tr.1111-1112). The use of the sewerage treatment plant is clearly an industrial one. (Tr. 1608).

The east side of the property is bordered by Coulee Mine. It is one of the major drainage canals in the City of Lafayette and has a width of approximately fifty feet. Behind this natural buffer lies Bendel Gardens, a residential subdivision on Beverly Drive. All of the homes in Bendel Gardens face Beverly Drive and not the Hernandez property nor the sewerage treatment plant. (Tr. 1112, 1115-1116).

West Bayou Parkway carries in excess of 12,000 vehicles per day and South College Road, at the particular section between West Bayou Parkway and Pinhook is currently one of the heaviest travelled roads in the entire city. There are in excess of 32,000 vehicles on South College Road at that point. (Tr. 1118-1119, Exhibit P-9).

B-1-M (medical offices) developments have been constructed directly across from the property on South College Drive. In the general vicinity of the property, numerous large office buildings have been constructed. (Tr. 1600-1612). At the trial level, one of the City's own local experts stated that the building trend from the Hernandez property moving towards Johnston Street would clearly be B-1-0. (Professional Offices).

Mr. Cecil Trahan, the *only expert* qualified to give opinions concerning sales of real estate in Lafayette, Louisiana, testified without hesitation that the property could only be "developed" in the sense that buildings could be placed physically on the property. It was his clear opinion that the property *could not be sold* in the City of Lafayette, Louisiana as R-1-A property. (Tr. 1440, 1441, 1464).

After a full trial on the merits, the trial judge found that the constitutional challenges to both the defendant's conduct in attempting to expropriate property through zoning and additionally in the application of the ordinance to the subject property should be sustained. On appeal, the Third Circuit Court of Appeal reversed the determination of the trial court. In its opinion, the Third Circuit *failed* to address the issues critical to Mr. Hernandez's case: the abuse and misuse of the police power by the City in an attempt to extract property from Mr. Hernandez without the payment of just compensation. Additionally, the Third Circuit's opinion ignored compe

tent testimony which clearly established at trial the conclusion that application of the R-1-A classification to the subject property deprived Mr. Hernandez of any economically use of his property. Plaintiff's timely application for a rehearing urging the Court to address these critical issues was filed on April 23rd, 1981. The application was denied without written reasons on May 8, 1981. Timely application for writs of certiorari or review to the Louisiana Supreme Court were also denied without written reasons on June 22, 1981. Appellant filed a Notice of Appeal to the United States Supreme Court with the Third Circuit Court of Appeal on July 22, 1981.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

A. THE IMPLICIT LEGITIMATION OF THE CITY'S CONDUCT BY THE LOUISIANA APPELLATE COURT JEOPARDIZES THE VERY SURVIVAL OF THE PROTECTIONS AFFORDED TO CITIZENS BY THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The decision of the Third Circuit Court of Appeal for the State of Louisiana in effect has told every municipality in this State and even across the Nation that it is not a violation of constitutional law for a city to attempt to blackmail a landowner by utilizing its zoning power as a sword in order to extract property rights from that landowner without the payment of just compensation. The Court failed to deal with the

constitutional challenges of Appellant and refused to even discuss the blatant misuse of the massive police power to strongarm this landowner into forfeiting his rights to due process and just compensation. If this decision is allowed to stand, it will be an invitation to municipalities across the nation to save expropriation dollars by threatening potential condemnees with blatant abuse of their constitutional proctections.

It is unquestionable that a local government has the power to regulate permissable land uses in conformance with a comprehensive plan. *Village of Euclid vs. Amber Realty Company,* 272 U.S. 365, 71 L.Ed. 303, 47S.Ct. 114 (1926). In order to be constitutional, however, the regulation must be a reasonable exercise of the police power. *Pennsylvania Coal Company vs. Mahon,* 260 U.S. 393, 67 L.Ed. 322, 43S.Ct. 158 (1922); *Goldblatt vs. Town of Hempstead,* 369 U.S. 590, 8 L.Ed. 2d 130, 82 S.Ct. 987 (1962). Due Process of law requires that the regulation must rationally promote a public objective and that, regardless of the benefits to be derived by the public from the land use regulation the property owner must not be denied a reasonable return on the properties subject to the regulation. *Nectow vs. City of Cambridge,* 277 U.S. 183, 72 L.Ed. 842, 48 S.Ct. 447 (1928). If the zoning restriction fails these tests, there is an invalid exercise of the police power, which deprives the landowner without due process of law. *Nectow vs. City of Cambirdge,* supra; *Goldblatt vs. Town of Hempstead, supra.*

The provisions of the 5th Amendment to the

U.S. Constitution are clearly made applicable to the States by virtue of the 14th Amendment to the United States Constitution. *Chicago B & Q Railroad vs. City of Chicago,* 166 U.S. 266, 41 L.Ed. 979, 17 S.Ct. 581 (1897).

In *Robertson vs. City of Salem,* 191 F.Supp., 604 (D.C., Ore. 1961), the plaintiff owned land lying within the municipality of Salem. The City of Salem passed a zoning ordinance applying to plaintiff's property. The State legislature passed a resolution indicating that the State wished to ultimately acquire property within the district at sometime in the future. The city ordinance passed by the government of Salem prohibited commercial and business activity on plaintiff's land.

Plaintiff's suit in the *Robertson* case contended that the zoning ordinance was passed for the purpose of preventing further economic development within the district and to hold and freeze the area of the district for future acquisition by expropriation by the State of Oregon without present payment of just compensation. An examination of the record in the instant case clearly shows that plaintiff's plea in the *Robertson* case is exactly on point with the plea of Mr. Hernandez herein.

The *Robertson* court noted that there were properties directly across one of the main traffic arteries which were zoned for and substantially devoted to commercial and business uses. Directly across South College Drive in the instant case stands

a medical office complex situated on property zoned B-1-M. In the *Robertson* case it was noted that within the same block as one of the parcels involved were pre-existing and non-conforming commercial business uses, much as the largest sewerage treatment plant in the City of Lafayette abuts Mr. Hernandez's property in the instant case.

The *Robertson* court stated that there was no evidence to show that removal of the restrictions would adversely affect property in the area. The record in the instant case clearly shows a great volume of testimony, including testimony by defendants on local experts, that a B-1-O development would not adversely affect the surrounding neighborhood in this case. Mr. Hernandez's expert real estate appraiser, Mr. Chappuis, testified that B-1-O was the highest and best use of the property, in addition to stating that such a use could enhance the overall area value instead of harming it. (Tr. 1364). Mr. Cecil Trahan, the only expert to testify in regard to real estate sales, noted that the property under a B-1-O classification would be a great benefit for the area and have no adverse impact on the surrounding neighborhood. (Tr. 1447). Dr. Dennis Ehrhardt, former planning director for the City of Lafayette, testified that B-1-O would be the best classification for the subject property. (Tr. 1344, 1348). Mr. James Broussard, the defendant's expert architect, testified that B-1-O classification was a restrictive one and that he had previously worked on B-1-O developments specifically designed to fit into residential neighborhoods. (Tr. 1614, 1615). Mr. Broussard fur-

ther testified that the Hernandez B-1-O site plan would not create any problems with the surrounding neighborhood. (Tr. 1618-1619; Exhibit P-49, Exhibit P-40).

After examining the facts of the case, the Court in *Robertson* posed the question:

"What then is the reason or purpose underlying and motivating the adoption of the ordinance and resulting land use restrictions on the property?" *Robertson*, supra, at p.610.

The Court in the *Robertson* case proceeded to answer its question:

> It is conceded that the motive of a legislative municipal zoning authority such as Salem's Council is not subject to judicial inquiry in adjudicating the validity of a zoning ordinance restricting land uses." *Annotation*, 71 ALR 2nd 568 (1960). On the other hand, it is not improper to judicially investigate "the real purpose, the object and the operative effect" of such an ordinance when laboring to determine its reasonableness. *Robertson*, supra, at p. 610.

The *Robertson* court noted that all the plaintiff was asking for was that the city either expropriate his property and pay him just compensation or allow him to use his property as did his neighbor across the street. *Robertson*, supra, at p. 611.

In addressing plaintiff's contention that the only purpose in establishing the district and imposing the land use regulations was to depress land values

and present a higher and better economic use of the property prior to some future eminent domain proceeding, the Court found that the evidence substantiated that point and led one inescapably to agree with the contention. The Court noted the letters and communications of the planning commission and other evidence which proved an indelible record of Oregon's "selfish intentions and desires for its future pocketbook."

The *Robertson* court concluded by finding the actions of the Salem Council as violating the provisions of the 5th and 14th Amendments to the Constitution of the United States:

> This Court is of the opinion that Ordinance No. 4578 is arbitrary and discriminatory and that it is, in effect, an attempt on the part of Salem to use its police power to take Robertson's property without due process of law and without payment or just compensation for the taking, and therefore violative of the guarantees of the Constitution of the United States and the State of Oregen and, hence, void as to Robertson. *Robertson*, supra, at page 612.

The holding in *Robertson* mirrors the opinion of the 15th Judicial District Court in the instant case:

> The power of a municipality to expropriate and the regulatory zoning functions performed by a political subdivision are entirely separate functions and should be kept so. *The evidence in this case is clearly to the contrary.*

Those principals of constitutional law were also

recognized by the United States District Court in and for the Northern District of California in *Arastra Limited Partnership vs. City of Palo Alto*, 401 F. Supp. 962 (D.C., N.D. Cal. 1975). Under circumstances similar to the *Robertson* case, the Court cautioned that "care must be taken, however, to distinguish between the power of the community to zone and the power to condemn." *Arastra*, supra, at p. 977. In the case before the *Arastra* Court, it found that if a local ordinance is not in factor a bona fide attempt to impose limitations on the use of the property of an individual, but rather the final step in a program designed to acquire rights over the property for the enjoyment and use of the public in general, the action must be found to be invalid. *Arastra*, supra, pp. 978, 979.

The refusal of the Third Circuit Court of Appeal for the State of Louisiana and the Louisiana Supreme Court to *even address* such grave constitutional challenges cries out for a review by appeal by this Honorable Court. It is simply no longer acceptable nor constitutional for a municipality to attempt to hide behind a veil of "presumption of validity" while utilizing that veil as a shield from constitutional scrutiny. The State of California, a hotbed of zoning litigation in recent years, has recognized the gravity of the problem and judicially provided for the appropriate remedy. The California courts have carved out a "notable exception" to the general rule that the motive of city officials is irrelevant to the inquiry of the reasonableness of a zoning ordinance. California courts may inquire into the motive of local legislators

where there are precondemnation activities intended to freeze or lower the value of property so that the property can be bought at a reduced price. *Pinheiro vs. County of Marin*, 60 Cal. App. 3rd 323, 327, 328, 131 Cal Rptr. 633 (1976); *Toso vs. City of Santa Barbara*, 10 Cal. App. 3rd, 934, 955, 162 Cal. Rptr. 210 (1980).

Mr. Hernandez stands before this Court and implores it not to declare open season on landowners who face the threat of governmental manipulation prior to anticipated expropriation. If the position of the Third Circuit Court of Appeal is left intact in this case, executive branches of government may indiscriminately use the police power as a sword upon which to impale unsuspecting landowners with the knowledge that in the event they are challenged, all that will be necessary is to retain one or two ex post facto "experts" who will state that in spite of everything which has been said by local experts in the past, a few more cars will appear on the road or neighborhood integrity will be infringed upon. This case will be a shining light for such violations of the United States Constitution. As the trial court clearly determined, the city's own experts advised passage of the requested zoning changes prior to the retention of Mr. Wiles, a land use planner from Washington, D.C. who spent *seven* days in the City of Lafayette, and Mr. Gern, a traffic expert from Illinois, who spent only *two* days in the City of Lafayette. Prior to the importation of these experts, *each member* of the Lafayette City Council had indicated that a change in zoning classification for the property was needed

either by his testimony or by his vote. The Planning Commission's professional staff of experts for the City of Lafayette has recommended a change from the R-1-A classification. Mr. Burt Landry, the city's Former Director of City Planning, has recommended that the property should be rezoned from it's R-1-A classification. Mr. Gene Cope, the defendant's appraiser testified that he believed the property should be rezoned from its R-1-A classification. Dr. Dennis Ehrhardt, formerly with the City of Lafayette, recommended rezoning the property from R-1-A.

The federal issues presented by Mr. Hernandez on this appeal are substantial and deserve consideration by this Court in full session in order to prevent the travesty which has befallen this landowner from ever occurring again.

B. THE APPLICATION OF THE R-1-A CLASSIFICATION TO APPELLANT'S PROPERTY LEAVES HIM WITH NO ECONOMICALLY VIABLE USE FOR THAT PROPERTY, AND SUCH VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

It is axiomatic that even if a zoning ordinance is found to be a valid exercise of the police power it is unconstitutional as applied to a particular landowner if that application denies him a reasonable return on his

investment or a reasonable use of his property. *Nectow vs. City of Cambridge*, supra; *Goldblatt vs. Town of Hempstead*, supra. The jurisprudence is clear that there is no set formula to determine where regulation ends and taking begins. *Goldblatt vs. Town of Hempstead*, supra, at P. 594. It is clear, however, that it is not necessary that property be absolutely taken in the narrow sense of that word to come within the protection of the Constitution. It is sufficient if the action by government involves a direct interference or disturbance of property rights. The government need not directly appropriate the title, possession or use of the property. *Richmond Elks Hall Association vs. Richmond Redevelopment Agency*, 561 F. 2d, 1327 (9th Circuit, 1977).

In *San Fillippo vs. County of Santa Cruz* 415 F. Supp. 1340 (N.D.Cal. 1976), the Court rejected the application of the "any reasonable basis" test and applied the "independent judgment test" for evaluating zoning regulations. The Court noted that:

> "The Constitutional test in "taking" cases requires an independent judicial analysis of the facts of the case and not merely a finding that the legislative body acted on substantial evidence or was not unreasonable or arbitrary in enacting the ordinance in question. Of course, the Court will give considerable weight to the well-considered planning decisions of State and local legislative bodies, but this is only one of several factors to be considered." *San Fillippo*, supra, at p. 1344.

It is, therefore, clear that the question of

whether or not there has been a taking through an application of a zoning ordinance to a particular piece of property depends upon an analysis of the facts of the case as applied to the land in question. Among the factors which must be considered are the extent to which the regulations have interfered with the distinct investment backed expectations of the landowner, the character of the governmental action and the economic impact of the regulation upon the landowner. *Penn Central vs. City of New York*, 438 U.S. 104, 57 L.Ed. 2d 631, 98 S.Ct. 2646 (1978).

As this Court has many times stated, the duty of the Supreme Court of the United States is not limited to the elaboration of constitutional principal; the Court must also in proper cases review the evidence to make certain that those principals can be constitutionally applied. *In Re Primus*, 436 U. S. 412, 56 L. Ed. 2d 417, 98 S. Ct. 1893 (1978). Even if there is no controversy as to the constitutional principal involved, when the question involved is in the application of such principals to the facts disclosed in a particular case, it is within the province of the Supreme Court to analysis the facts in order that the appropriate enforcement of the Federal right may be assured. While conclusions reached by the highest court of a state are entitled to great respect, it is the solemn duty of the Supreme Court to make independent inquiry and determination of the disputed facts. *Whitus vs. State of Georgia*, 385 U. S. 545, 17 L.Ed. 2d 599, 87 S. Ct. 643 (1967).

This Court has frequently observed that

whether a particular restriction will be rendered invalid by the governments failure to pay for any looses caused by it depends largely "upon the particular circumstances" in that case. *Penn Central Transportation Company vs. City of New York*, supra, p. 2659. Appellant submits that a review of the record in this case will clearly support the determination of the trial judge that Mr. Hernandez has been deprived of all reasonable use of his property by the application of the existing ordinance.

A review of the opinion of Third Circuit Court of Appeal will demonstrate that it based its determination that Mr. Hernandez was not deprived of all resonable use of his property under a R-1-A classification on an isolated estimate as to the value of the property made by appellant's zoning expert and on the opinion of the defendants' expert real estate appraiser. The record clearly shows that the guess as to value by defendant's *zoning* expert was explicitly qualified by his testimony to the effect that he was not an expert in real estate appraisal and also that hecould be substantially off in terms of the dollar figure which he would put on the property. (Tr. 1350). With regard to the opinion of the City's expert real estate appraiser, the Third Circuit failed to take cognizance of the gross defect in his analysis which rendered his results inapplicable to the subject property. The property utilized in Mr. Cope's methods of analysis were clearly shown to be totally inappropriate in determining land values on the subject property. The trial court clearly recognized Mr. Cope's approach as an "apples and oranges" affair.

The evidence in this case clearly points out that Mr. Hernandez's property is chained to disuse under its present classification. Mr. Cecil Trahan, the only expert in real estate sales who testified at trial, stated *without contradiction* that Mr. Hernandez would not be able to use his property under the R-1-A classification:

> "Q. Have you an opinion as to whether the property can be economically developed for townhouses, the subject property.
>
> MR. TORIAN: In what classification?
>
> BY MR. SIEMON, CONTINUING.
>
> Q. Under the R-1-A Classification.
>
> A. They could be developed, no question. But I don't think they could be sold, economically feasible to be sold. You could give it away, you know. (Tr. 1464).
>
> Q. Mr. Trahan, do you believe this property is suited to be sold in the market as R1A property?
>
> A. No, I do not. (Tr. 1440).
>
> Q. Mr. Trahan, as a developer, do you have an opinion as to whether it could be developed whether it could be economically feasible to develop it under the R-1-A zoning?
>
> A. My opinion is that it could be developed, but because of the facts brought up earlier don't think it would be economically feasible. (Tr.1441).

The testimony at trial noted that the combination of the irregular configuration of the property, the various easements which traversed the property, the promixity of the sewerage plant, and the high volume of traffic in the area rendered this property completely unsuitable for an R-1-A classification. Even the city's own land use planning experts admitted that given the *present* configuration of the easements on the property, it would *not be possible* to develop this property under a R-1-A classification. (Tr. 1702). However, this fact also was *ignored* in the opinion of the Third Circuit Court of Appeal.

Finally, the testimony at trial clearly showed that the treatment of this piece of property by the City of Lafayette through the years, specifically the nature of the city's treatment of the realignment project through the property, would stymie development under a R-1-A classification and result in the property being taken out of commerce for many years to come. (Tr. 1441).

It is beyond the scope of this jurisdictional statement to completely set forth all of the factual testimony which dictates the conclusion that Mr. Hernandez has been deprived of all reasonable use of his property. However, the physical facts which have been herein related truly dictate Mr. Hernandez be given the opportunity to demonstrate to this Court the continuing violation of his constitutional rights by the City of Lafayette, Louisiana.

CONCLUSION

This appeal raises issues of critical and fundamental importance to the future of landowners' ability to invoke the protection of the Constitution of the United States against the tremendous potential for abuse of the police power by a municipality. Mr. Hernandez appeals to this Court for protection for himself and for countless future landowners who face the threat of governmental manipulation through zoning prior to anticipated expropriation. To condone such conduct by a municipality will be to authorize the use of the zoning power as a substitute for the right to just compensation under the Constitution. This case goes far beyond potentially legitimizing the City of Lafayette's political maneuvers in an attempt to win a lawsuit from a single individual. As the evidence clearly showed, the defendants, their plan to expropriate Mr. Hernandez's property through zoning being uncovered, freely manipulated the ordinance of necessity for the realigmnemt project in order to create a condition at trial which they felt would be most favorable to their litigation posture. The years of delay experienced by Mr. Hernandez in attempting to have the property rezoned was solely due to an attempt to take his property through zoning. The City's own documents established that the *only two persons* who were denied a change in zoning in the South College Road area in the last few years are Mr. Thomas Green and Mr. Hernandez, both of whom "happened" to own property which would have to be expropriated when the realignment project came to fruition. (Tr. 1786; Exhibit P-8). To dismiss such facts as coincidence is to ignore the reality of the evidence.

We respectfully submit that the Federal questions presented in this appeal are substantial and deserving of a review. To deny review in this case will be to legitimize the gross abuse of the police power and to ignore the shield of protection afforded by the Constitution.

RESPECTFULLY SUBMITTED:

JOSEPH ONEBANE

JOHN G. TORIAN, II

MICHAEL G. DURAND

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon Mr. Charles L. Siemon of Ross, Hardies, O'Keefe, Babcock and Parsons, 1 IBM Plaza, Suite 3100, Chicago, Illinois 60611, by placing same in the U.S. Mail, postage prepaid.

New Orleans, Louisiana, this 19th day September, 1981.

_____

JOSEPH ONEBANE

APPENDIX

A-1

NUMBER 8098

JAMES HERNANDEZ
Plaintiff-Appellee

Versus

CITY OF LAFAYETTE,
CITY COUNCIL OF LAFAYETTE
Defendants-Appellants

On appeal from the Fifteenth Judicial District Court, Parish of Lafayette, State of Louisiana; the Honorable Bradford Ware, Judge, Presiding.

Before: GUIDRY, CUTRER and LABORDE, Judges.

LABORDE, Judge.

Appellants, the City of Lafayette and the City Council of the City of Lafayette appeal an adverse judgment of the district court in an action for declaratory and injunctive relief filed by James E. Hernandez, appellee, challenging the validity ofthe zoning ordinance of the City of Lafayette as it applied to land owned by Hernandez. The trial court rendered judgment in favor of Hernandez and directed the City of Lafayette to rezone plaintiff's property from R-1-A to B-1-0.

The issue on appeal is the validity of the zoning ordinance of the City of Lafayette as applied to the Hernandez property. We reverse the decision of the

trial court. The presumption of validity which attaches to legislative enactments can be overcome or defeated only by proof that no competent evidence has been adduced to support the result of the legislature's action. We find that the zoning decision of appellants as it applies to the Hernandez property is supported by substantial and competent evidence adduced in proceedings which were regular and orderly.

THE FACTS

On three (3) separate occasions beginning on August 12, 1975, Hernandez sought to have his property rezoned from R-1-A residential (single family detached and townhouse) to B-1-M (medical office), R-2 (apartments) and B-1-O (professional office). All three (3) legislative attempts failed to become law under the provisions of the charter of the City of Lafayette. In his petition, Hernandez alleged that the City's failure to rezone his property as requested violated the Louisiana Municipal Zoning Regulations, LSA-R.S. 33:4721 et seq[1] and the constitutions of the State of Louisiana and the United States.

---

1. LSA-R.S. 33:4721 provides:
"For the purpose of promoting health, safety, morals, or the general welfare of the community, the governing authority of all municipalities may regulate and restrict the height, number of stories, and size of structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of the buildings, structures, and land for trade, industry, residence, or other purposes; provided that zoning ordinances enacted by the governing authority of municipalities or the acts of the zoning commission, board of adjustment as herein provided for, or zoning administrator shall be subject to judicial review

The Hernandez property is a 16.7 acre highly irregular tract of land located in the City of Lafayette immediately south of the intersection of West Bayou Parkway and South College Road. (See appendix "1" attached hereto. The Hernandez property is shaded.) The property located to the north, east, south, and west of the Hernandez property is zoned R-1-A. To the northwest, across West Bayou Parkway from the narrow neck of the Hernandez property is a tract of land zoned R-2 which has been developed into townhouses. A tract of land zoned B-1-M is located to the northwest on the opposite side of South College Road. To the east of the Hernandez tract is Coulee Mine, a fifty foot drainage canal. To the south of the Hernandez tract is the largest sewerage treatment plant in the city of Lafayette. The sewer plant was constructed prior to most of the development in the neighborhood, including the Hernandez residence. The property is traversed by a series of utility easements. The property is currently improved with two single-family detached residences, and has been used for residential purposes for many years. The Hernandez property is zoned R-1-A.

In his written reasons for judgment dated June 9, 1980, the trial judge concluded that:

"After reviewing the law and the evidence

Footnote 1 - Continued-
on the grounds of abuse of discretion unreasonable exercise of the police powers, an excessive use of the power herein granted, or the denial of the right of due process, provided further, that the right of judicial review of a zoning ordinance shall not be limited by the foregoing."

and hearing the arguments of counsel, the Court finds the denial of the rezoning of the Hernandez property to have been an arbitrary, capricious, unreasonable and excess use of police power. In addition, this Court finds this denial of rezoning bears no *substantial* relation to the promotion of the public health, safety, morals or general welfare of the citizens of the City of Lafayette."

On June 25, 1980, the trial court entered judgment in favor of Hernandez and directed the City of Lafayette to rezone the Hernandez property to B-1-O.

The appellants urge four (4) trial court errors:

1.
"The trial court erred by exceeding the proper scope of judicial review by considering evidence of motives of the city.

2.
The trial court erred by exceeding the proper scope of judicial review by substituting its judgment for that of the city's.

3.
The trial court erred by its findings of facts which are so contrary to the manifest weight of the evidence that they and the court's ruling are clearly erroneous.

4.
The trial court erred in excluding expert, testimony based on hearsay during defendants' case."

Assignments of error 1 and 2 will be considered

and discussed together. In view of our decision we pretermit discussion of errors 3 and 4 assigned by appellant.

The validity of the zoning ordinance of the City of Lafayette as applied to the Hernandez property is the issue on appeal. We have previously stated that the presumption of validity which attaches to legislative enactments can be overcome or defeated only by proof that no competent evidence had been adduced to support the results of the legislature's action. Clearly, we will not exceed that scope of review.

THE PROPER JUDICIAL SCOPE OF REVIEW

The standards or principles by which zoning regulations are tested by Louisiana courts are well-established. See, e.g., *Four States Realty Co., Inc. v. City of Baton Rouge*, 309 So.2d 659 (La.1975); *State ex rel. Civello v. City of New Orleans*, 154 La. 271, 97 So. 440 (1923); *West v. City of Lake Charles*, 375 So.2d 206 (La.App.3rd Cir. 1979) *writ refused*, 378 So.2d 435 (La.1979); *Trustees Under the Will of Pomeroy v. Town of Westlake*, 357 So.2d 1299 (La.App. 3rd Cir. 1978), *writ denied*, 359 So.2d 205 (La.1978).

> "It is *well settled* in our jurisprudence that duly enacted zoning ordinances are presumed to be valid (Emphasis added).

West v. City of Lake Charles, 375 So.2d at 209.

Zoning, as a legislative power, is presumed valid and one challenging a zoning enactment bears an

extrodinary burden to overcome the presumption of validity. *Village of Euclid vs. Ambler Realty Co.*, 272 U.S. 365 (1926); *Four States Realty Co., Inc. vs City of Baton Rouge, supra;* and *Henry vs. City of Monroe*, 349 So.2d 1006 (La.App. 2nd Cir. 1977).

> "The court will uphold the ordinance unless it is clearly shown that the action of the governing authority was arbitrary or unreasonable, or that the action taken violated a provision of the Constitution or of the enabling statutes." *Kirk vs. Town of West Lake*, 373 So.2d 601 at 602 (La.App. 3rd Cir. 1979), *writ denied*, 376 So.2d 1268 (La. 1979).

Doubtful cases will be resolved in favor of the validity of the challenged zoning enactment. *Four States Realty Co., Inc. vs. City of Baton Rouge, supra;* and *Kirk vs. Town of West Lake, supra.*

And, in testing the validity of an ordinance, the courts have nothing to do with the wisdom or good policy of the ordinance. This judicial deference to legislative discretion in the enactment of laws, zoning or otherwise, is a cornerstone of the doctrine of separation of powers.

> [a]lthough it has been indicated in some decisions that a court may be given by statute power to substitute its judgment for that of a city government relative to zoning matters, a statute so providing has been deemed unconstitutional on the ground that the legislative functions of adapting zoning plans and laws may not be performed by the judicial department of government. *Meyers vs. City of Baton Rouge*, 185 So.2d 278 (La.App. 1st Cir.

1966).

A challenge to a zoning decision in Louisiana is not an appeal from the decision of a lower tribunal wherein the Court scrutinizes the record below to test the accuracy of the City's decision; rather it is a de novo proceeding which tests whether the result of the City's legislation (here the R-1-A classification) is "arbitrary and therefore a taking of property without due process of law." *Westside Lumber & Supply v. Parish of Jefferson*, 357 So.2d 1384, 1385 (La. App. 4th Cir. 1978). In *Meyers v. City of Baton Rouge, supra*, the First Circuit noted that even where no competent evidence to support a zoning decision was adduced in front of the governing body, the resulting legislation will nevertheless be upheld if the result is supported by evidence adduced at trial. The *Meyers* court explained:

> "The initial action by appellants herein is not an appeal but rather a suit attacking the validity of a duly adopted municipal ordin-ance. . ." (at 281)

And

> "that the hearings required are designed solely to afford interested parties an opportunity to be heard before the governing authority makes a decision under its police power. . . How, when and where the local authorities gain knowledge of the subject matter is of no concern to the courts. What is said at the required public hearings is not necessarily the criteria of reasonableness when an ordinance of such nature is attacked as being arbitrary or discriminatory. The test to be applied is

> whether it is *in fact* arbitrary, unreasonable and discriminatory in the light of all attending circumstances."
> (at 282-83) (Emphasis added)

In *Westside Lbr. & Supply v. Parish of Jefferson, supra*, the Fourth Circuit reversed a trial court's decision because it had applied the wrong test in reviewing a local legislative zoning decision. The trial court had ruled that the test was "simply to determine whether or not the board was acted arbitrary . . .and whether or not the decision of the board was supported by substantial; and competent evidence adduced in proceedings which were regular and orderly." In reversing the trial court, the Fourth Circuit reaffirmed the distinction between review of administrative and legislative decisions of local government. The proper test for legislative decisons is not whether the board acted arbitrarily in light of the evidence it had before it at the time of decision but whether the resulting "legislation is so arbitrary and therefore a taking of property without due process of law."

THE HERNANDEZ CHALLENGE TO THE ZONING ORDINANCE

One challenging a zoning enactment has the difficult burden of proving to the Court that the existing classification is unreasonable, that is, that it bears no substantial relationship to the public health, safety, morals or general welfare of the municipality. It is not enough to show that the new zoning sought is reasonable. *West v. City of Lake Charles, supra.* Nor is it enough to show that reasonable men might reach a different conclusion from that reached by the City,

Maher v. City of New Orleans, 516 F.2d 1051, 1061 (5th Cir. 1975), U.S. *Cert denied* 426 U.S. 905 because courts do not substitute their judgment for that of the legislative branch of government.

> "But courts may not become virtual zoning boards and it is not our function to judge the zoning merits of the proposed change or the wisdom of the Council in turning it down. We may disagree with the Planning Director and the Parish Council, and had we been sitting on the Parish Council we may have voted for the change, but that is not to say that plaintiffs are now as a matter of law entitled to invalidate the action taken by the Parish Council."

Paternostro v. Parish of Jefferson, 289 So.2d 327, 331 (La. App. 4th Cir. 1973), *writ refused*, 293 So.2d 183 (La. 1974).

In our view the trial court failed to perform this duty. The record contains substantial evidence to support an objective determination that the property should remain zoned R-1-A, residential, rather than be rezoned under a commerical classification.

Evidence adduced at trial shows that rezoning of the subject property from residential to commercial could be incompatible with and have an adverse effect on the surrounding areas. For one, the vast majority of the developed land in the general vicinity of the subject property is zoned residential. In fact, except for the fifty-foot neck of plaintiff's property, the subject tract is surrounded by residentially zoned or residentially used property. In this regard, there was

considerable testimony showing legitimate concern that allowing a commercial intrusion into the residential neighborhood may initiate a chain of further commercial rezonings thus destroying the neighborhood's residential character. Plaintiff's own planning expert, Dr. Dennis Ehrhardt, testified that such rezoning would be likely to cause this so-called "domino effect." His testimony was corroborrated by testimony of Mr. Bert Landry, a former director of city planning whose deposition was introduced into evidence by plaintiff. Mr. Landry stated:

> "The [city] would be hard pressed to deny similar uses... it would make the ultimate character of the area commercial." (Tr. 1081)

Another adverse impact on the surrounding area is the increased traffic congestion which would result from a commercial rezoning of plaintiff's land. The record in this regard shows that development of the property for non-residential uses would produce unsafe traffic conditions. For example, Mr. Richard Gern, a traffic expert with 23 years of practical experience throughout the nation, testified regarding the traffic impact of R-1-A, R-2, B-1-O and B-1-M zonings of the subject property. Based on his analysis of known trip generation rates adjusted to reflect local traffic factors in Lafayette, Mr. Gern testified that unsafe traffic conditions would result if the property were developed as R-2, B-1-M or B-1-O. In contrast, he testified that R-1-A would have no adverse impact on adjacent roads because the traffic system had available capacity for such uses. Mr. Gern further testified that in order to accommodate the traffic generated by the more intense use classification,

substantial changes in the character of roads through established neighborhoods would be required to the substantial detriment of those neighborhoods. In Gern's opinion, such changes would have serious adverse impacts upon the city as a whole. In addition, any non-residential classification would substantially decrease intersectional capacity and result in traffic 36% over design capacity which, according to Mr. Gern, would undoubtedly lead to unsafe conditions.

Upon our review, we hold that the record in this case does reveal a valid, objective basis upon which the City of Lafayette could reasonably conclude that retaining the R-1-A zoning classification of the subject property serves the public health, safety and welfare.

Upon our finding that the City of Lafayette did not act unreasonably in retaining the R-1-A zoning classification, our inquiry continues. We now must determine whether the City acted arbitrarily or in an unconstitutional manner in refusing to reclassify plaintiff's property.

That the City of Lafayette did not act arbitrarily is evident from its zoning history, not only of the area surrounding the subject property, but of other areas throughout Lafayette as well.

The Director of Planning, the City's Zoning Administrator, an expert land use planner and a traffic engineer testified in regard to the planning issues involved in the R-1-A classification as applied to plain-

tiff's property. According to the record the property is located in a "planning" area circumscribed by South College Road, Pinhook Road, the Vermilion River, Brentwood Boulevard and Johnston Street. Within that neighborhood are two high intensity use corridors — one along Johnston Street and the other along South College Road. The zoning history of the vicinity of the subject property reveals that the southern border of the high intensity zone along South College - the boundary plaintiff asks the Court to extend down West Bayou Parkway — has been intact since 1963 and that the City has never waivered in its treatment of the subject property.

Mr. W. Anthony Wiles, a land use planner with 18 years of experience in land planning and development, after being qualified as an expert, described in detail a series of zoning and planning analyses he conducted. These analyses were based on an examination of the zoning ordinances adopted by the City of Lafayette, along with its zoning maps and all ordinances rezoning property since 1963. According to Mr. Wiles this examination revealed several distinct policies:

> 1. that the area of the subject property has always been maintained as low density single-family residential with the exception of a high intensity corridor along South College and Johnston.
>
> 2. that the zoning actions of the City reflect a very strong relationship between the arterial network and major concentrations of commercial development within the City.

3. that large scale commercial development has been confined to the intensity corridor, along South College and Johnston Streets, the central business district, the oil center, or the periphery of the City.

4. that property previously zoned R-1-A has very rarely been rezoned unless the action would conform to the aforementioned policies." (Tr. 1652, 1654)

Appendix "2" graphically demonstrates that the City's zoning decisions have been uniform in confining commercial and business districts to frontage on the City's arterial road network.

Mr. Wiles' study also showed that South College has been designated for high intensity uses since the area was annexed into the city. Moreover, the natural boundary at the intersection of West Bayou Parkway and South College between the high intensity corridor and the R-1-A district has not waivered in 17 years.

We find the City's denial of rezoning in the instant case to be consistent with its prior land use policies. Hence, we hold that the City did not act arbitrarily.

We next determine whether the City's action denies plaintiff due process by depriving him of all beneficial use of his property.

Louisiana courts have held that a regulation which deprives a landowner of all beneficial use of his

property deprives him of his property without due process of law. *Hardy v. Mayor and Board of Aldermen et al*, 348 So.2d 143 at 149 (La. App. 3rd Cir. 1977), *writ refused*, 350 So.2d 1212 (La. 1977); *Dufau v. Parish of Jefferson*, 200 So.2d 335, 337 (La. App. 4th Cir. 1967). However, the fact that a zoning ordinance does not permit an owner the most advantageous economic use of his land does not render the ordinance invalid. *West v. City of Lake Charles, supra.*

Applying the above principles to the instant case, we hold that plaintiff failed to show that the subject property has no practical use under the present R-1-A classification. In fact, plaintiff's own witnesses established the utility and value of the property for development under the R-1-A classification. For example, Dr. Ehrhardt testified that, based on his familiarity with the housing market in Lafayette and his experience in real estate, the property is worth at least $1,000,000. In addition, the City's expert appraiser, the only appraiser who testified as to land values, stated that his analysis (based on two separate appraisal approaches) indicated a value of $75,000 per acre which equals approximately $1,180,000 for the tract excluding the site of the Hernandez home.

In conclusion, our review of the record convinces us that the plaintiff has failed to meet his burden of proving that the City's classification of the property was unreasonable, arbitrary, or a denial of due process. Further, we do not find that there has been an abuse of discretion or excessive use of power

by the City in refusing to rezone the Hernandez property.

For the foregoing reasons the judgment of the district court is reversed and set aside.

It is now ordered adjudged and decreed that plaintiff's suit against defendants be dismissed with prejudice. All costs in the trial court as well as the costs of this appeal are assessed against the plaintiff.

REVERSED AND RENDERED.

OFFICE OF CLERK
COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA
P. O. Box 3000
Lake Charles, La. 70602

NOTICE OF JUDGMENT

Gentlemen:

Attached you will find a copy of the judgment of this Court in a case in which you are an attorney of record.

Your attention is invited to Rule XI of the Uniform Rules of the Courts of Appeal, as amended, effective January 1, 1978, regulating applications for rehearing.

Notice especially that Section 1 provides the

delay for applying for a rehearing shall commence with the mailing by the Court, rather than receipt by counsel, of notice of judgment, and that the delay shall be 30 days, rather than 14 days.

Also, please note that Article 2166 of the Code of Civil Procedure, as amended by Act 179 of 1977, effective January 1, 1978, provides that it is no longer necessary to apply to the Court of Appeal for a rehearing as a prerequisite to applying to the Supreme Court for writs.

Cordially yours,

KENNETH J. deBLANC
Clerk of Court

CC: Suit Record
(NOTE: Office hours are 9:00 A.M. to 5:00 P.M. for filings).
March 26, 1981.

B-1

COURT OF APPEAL, THIRD CIRCUIT
State of Louisiana

JAMES HERNANDEZ

v. No. 8098

CITY OF LAFAYETTE

BEFORE: JUDGES Guidry-Cutrer-Laborde

ORDER

The Application for Rehearing herein having been duly considered:
IT IS ORDERED that a Rehearing be, and the same is hereby, denied.
Lake Charles, Louisiana, this 8 day of May, 1981.

E.L.G., Jr.
C.C.C.
P.J.L., Jr.

Judges

Filed - May 8, 1981
/S/ Marie D. Hawkins
Clerk

Port No. 975

A TRUE COPY
Lake Charles, La.
Sept. 8, 1981
/S/ Kenneth J. deBlanc
Clerk, Court of Appeal,
Third Circuit

C-1

THE SUPREME COURT OF THE
STATE OF LOUISIANA

JAMES HERNANDEZ
VERSUS
CITY OF LAFAYETTE,
CITY COUNCIL OF LAFAYETTE

No. 81-C-1471

Re: James Hernandez, applying for Certiorari, or writ of Review, to the court of Appeal Third Circuit, Parish of Lafayette, Number 8098.

June 22, 1981
Writ denied.

FAB
JAD
PFC
WFM
JLD
JCW

Supreme Court of Louisiana
June 22, 1981

/S/illegible

Clerk of Court
For the Court

D-1

FIFTEENTH JUDICIAL DISTRICT COURT

PARISH OF LAFAYETTE

STATE OF LOUISIANA

JAMES HERNANDEZ
VERSUS
: DOCKET NUMBER: 78.0381-A
THE CITY COUNCIL OF LAFAYETTE
THE CITY OF LAFAYETTE,
ITS ELECTED OFFICIALS,
EMPLOYEES AND AGENTS

JUDGMENT

This cause having been duly heard and submitted to the Court for adjudication, the Court, upon considering the law and evidence and finding same to be in favor of plaintiff and against the defendants for the reasons assigned in the written opinion of this Court dated June 9, 1980;

IT IS ORDERED ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, James E. Hernandez and against defendants, The City Council of Lafayette and the City of Lafayette, Louisiana, and that a mandatory injunction be and is hereby issued as prayed for, directed to the City of Lafayette, Louisiana, through its elected officials, agents and employees to forthwith rezone and reclassify the immovable property owned by plaintiff from R-1-A (Single Family Residence) to

B-1-O (Office District Special); said property being described as follows:

> That certain irregular shaped parcel of ground situated on the south side of College Road, Lafayette, Louisiana, bounded northerly by South College, easterly by Coulee Mine, southerly by the South Side Sewerage Treatment Plant and Andrus Investments and westerly by West Bayou Parkway, said tract containing 16.7 acres more or less.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the City of Lafayette, Louisiana, through its City Council, its elected officials, employees and agents be and they are hereby ordered to adopt in accordance with the applicable rules and procedures for the adoption of ordinances, an ordinance which will amend the Comprehensive Zoning Ordinance of the City of Lafayette, Louisiana, Ordinance No. 0-191, reclassifying the property of James E. Hernandez from R-1A (Single Family Residence) 2B-1-O (Office District-Special). Such ordinance shall exactly track the language of that certain Ordinance No. 1785 past by the Lafayette City Council on May 8, 1979. The ordinance shall read as follows:

> Ordinance No._____: Ordinance amending the Comphrensive Zone Ordinance, ordinance, ordinance No. 0-191, so as to reclassify the property of James Hernandez, bounded by South College Road, Coulee Mine, West Bayou Parkway and South Sewerage Treatment Plant access road from R-1-A (Single Family Residence) to B-1-O (Office District-Special).
>
> BE IT ORDAINED by the City Council of the City of Lafayette:
>
> SECTION 1: Ordinance No. 0-191 is

hereby amended so as to reclassify the property of James Hernandez bounded by South College Road, Coulee Mine, West Bayou Parkway and South Sewerage Treatment Plant access road. (As shown on plat on file with the zoning commission), from R-1-A (Single Family Residence), to B-1-O (Office District-Special).

SECTION 2: This reclassification shall become effective upon the submission by the land owner to the zoning commission of a site plan which meets all the pertinent requirements of the Comprehensive Zoning Ordinance relating to a B-1-O district.

SECTION 3: All ordinances or resolutions or parts thereof in conflict herewith are hereby repealed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon passage of the aforementioned ordinance by the City Council, the Mayor of the City of Lafayette shall take all necessary actions as required by law to insure timely and prompt inactment of the amending ordinance.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the City of Lafayette, Louisiana is assessed all taxable costs herein.

JUDGMENT READ, RENDERED AND SIGNED in Open Court this 25th day of June, 1980, at Lafayette, Louisiana.

D-4

/S/illegible

District Judge

SUBMITTED BY:

ONEBANE, DONOHOE,
BERNARD, TORIAN, DIAZ
McNAMARA & ABELL

(A Professional Law Corporation)

By: _____
JOHN G. TORIAN, II

By: _____
MICHAEL G. DURAND

APPROVED AS TO FORM ONLY
ALL RIGHTS RESERVED:

ROSS, HARDIES, O'KEEFE,
BABCOCK & PARSONS

By: _____
CHARLES SIEMON
(filed June 25, 1980)

Charles Siemon

John G. Torian, II

Michael G. Durand

E-1

FIFTEENTH JUDICIAL DISTRICT COURT

PARISH OF LAFAYETTE

STATE OF LOUISIANA

JAMES E. HERNANDEZ
VERSUS NO.78,0381-A
THE CITY COUNCIL OF LAFAYETTE
THE CITY OF LAFAYETTE, ITS
ELECTED OFFICIALS, EMPLOYEES
AND AGENTS.

RULING

Trial of this matter was had on January 3 and 4, 1980 and February 5-8, 1980. After reviewing the law and the evidence and hearing the arguments of counsel, the Court finds the denial of the rezoning of the Hernandez property to have been an arbitrary, capricious, unreasonable and excess use of the police power. In addition, this Court finds this denial of rezoning bears no *substantial* relation to the promotion of the public health, safety, morals or general welfare of the citizens of the City of Lafayette.

The facts of this controversy commenced in August of 1975 when Mr. James E. Hernandez first requested that the City of Lafayette rezone his 16.7 acre parcel of land situated on the corner of South College Drive and the intersection of West Bayou Parkway from R1A "residential" to B1M "medical office".

Thereafter, the evidence indicates that the City began to plan a realignment of South College Drive and West Bayou Parkway which would necessitate the expropriation of at least part of the subject Hernandez property.

However, in November of 1975 the Mayor of the City of Lafayette announced that the realignment project was "abandoned". In December of 1975, the City of Lafayette, through their Director of Public Works, sought to negotiate with Mr. Hernandez for the dedication of properties for alternative intersectional changes rather than expropriation for the "abandoned" realignment project. The ordinance to rezone Mr. Hernandez's property was then introduced and discussion commenced. Numerous city officials as well as Councilman Benny Ritchey stated that the zoning request should be denied because to grant this would cause the City to pay more for the Hernandez property when the right of way (the West Bayou Parkway Realignment) was created. The Council sometime thereafter denied the first request for rezoning

On August 9, 1977 the plaintiff filed a second request for rezoning from R1A to an R2 classification. The City Planning Commission recommended the change to R2 be granted by the City Council. Thereafter, the City Council appropriated funds for an engineering feasibility study for the West Bayou Parkway Realignment. The City Council then tabled Mr. Hernandez's second request for rezoning until the City of Lafayette determined which route proposed realignment would take.

The instant lawsuit was filed on February 3, 1978. The Council then voted to rezone Mr. Hernandez's property to R2. The Mayor then vetoed the vote of the City Council, and the Council failed to override the Mayor's veto. Some time later the City's attorney commenced negotiations with the Hernandezes for a settlement of the pending lawsuit. A trial date of February 7, 1979 had been obtained. On the same date a document comprising a settlement agreement was signed by both the City Council and the Mayor. The plaintiff then upset the trial date. Less than one (1) month later the Mayor refused to sign the formal compromise agreement which would have terminated the pending lawsuit.

Mr. Hernandez then appeared before the Lafayette City Council for his third request for rezoning from R1A to B1O which would have been compatible with the City's pending realignment project. The City Council again voted to rezone the plaintiff's property and once again the Mayor successfully vetoed their decision.

Thereafter, the City upon advice of its legal counsel (as admitted by numerous City officials) that it would in all probability lose the lawsuit unless the realignment project were dropped, repealed Ordinance No. 0-1759 which had declared the realignment project a "necessity". Evidence abounds that the ordinance was repealed solely due to the pending lawsuit instituted by Mr. Hernandez. Furthermore, no substantive evidence was adduced at the trial to support the repeal of this ordinance other than the threat

of losing the plaintiff's suit against the City of Lafayette. The City's legal counsel repeatedly warned the City, as admitted by several of the Council members not to use their zoning powers as a leverage device to obtain rights of way for City improvement projects. Nonetheless, the City proceeded in its course of action and repealed the ordinance of necessity in a final attempt to win the lawsuit instituted by Mr. Hernandez.

This Court finds that the City acted unreasonably, arbitrarily and capriciously and thereby denied Mr. Hernandez due process for many reasons. Firstly, the denial of rezoning of the Hernandez property was shown to be inconsistent with the prior land use policies of the City of Lafayette. Justice demands the uniform treatment of applications for zoning changes by any municipality granted the authority to promulgate such regulations under the auspices of LSA-R.S. 33:4721. The evidence indicated that the only two persons who were denied rezoning in the high intensity corridor in the South College Drive neighborhood were Mr. Thomas Green and Mr. James Hernandez. At least a part of both of these men's property would be expropriated if the West Bayou Parkway realignment project was "resurrected". (This Court finds this project only dormant and not dead at all!)

In addition, this Court found both West Bayou Parkway and South College Road to be arterials. Defendant's contention that West Bayou Parkway is a collector was simply unsupported by the evidence. Furthermore, the Court found the subject Hernandez

property to be part of the South College Drive neighborhood even though only a small portion of the property actually fronts on South College Drive. Prior to the institution of the plaintiff's lawsuit all documents and testimony establish that even the City Planning Commission included the subject property in the South College Drive neighborhood and classified West Bayou Parkway as an arterial. Thus, the rezoning of the Hernandez property to a commercial classification would be perfectly compatible with the surrounding property.

The City Council could not have justifiably established that the rezoning of the Hernandez property would have an adverse impact on the neighborhood. A sewer plant which abuts the Hernandez property and which fronts entirely on West Bayou Parkway must certainly be classified as a light industrial use. A townhouse project zoned R2 is across from the Hernandez property on the West Bayou Parkway side and a B1M medical complex faces the Hernandez property on South College Drive. Defendant's argument that a domino-like effect would occur if the Hernandez property were rezoned causing an intrusion into residential areas is without merit. As plaintiff pointed out, the Offshore Logistics Building is a perfect example of an attractive office building which is in harmony with the residential area in which it i situated. The Surgery Center, the 515 Building and numerous other large commercial establishments form part of the high intensity corridor along South College Drive. The construction of such large office complexes indicate the great need in Lafayette for

commercial office space.

Thirdly, the plaintiff amply demonstrated that no major adverse impact on traffic would occur if the Hernandez property was rezoned. Much of the traffic problem has been alleviated due to the intersectional changes already accomplished at this crossroads and no experts were able to determine exactly what the impact of a residential development (R1A) would have on the traffic problem. Most importantly, *any* kind of development which the plaintiff would create will have an effect on traffic. The City has alternative methods of West Bayou Parkway rather than the denial of rezoning the Hernandez property.

Lastly and most importantly, to deny the rezoning of the Hernandez property is to deny Mr. Hernandez all practical use of his property besides that of his own personal residence. No evidence indicated a suitable plan for the development of this tract under the existing R1A classification. This Court is well aware that municiplities are not required to rezone property to insure that its owner receives the maximum economic potential from its development. However, to prevent the development of prime property in Lafayette where land is at a premium does not appear to have as its basis a valid legislative objective.

The plaintiff clearly showed that the plans for development submitted by defendants were ludicrous at best. Firstly, there are no R1A townhouse developments in the City of Lafayette at this time.

Nor are there any exclusive residential developments surrounded by berms. The development costs, especially the removal of the existing easements, make all but commercial development an impossibility. Additionally, defendant's proposals for development failed to meet the requirement for adequate ingress and egress for fire protection. Perhaps the greatest drawback to R1A development is the sewage treatment plant. Certain frontage on an industrial sewerage plant will be a gross detriment to the development of an exclusive residential area. The heavy traffic on South College Drive would be a further deterrent to those persons desiring an exclusive residential neighborhood. Defendant's argument that Bendel Gardens, an exclusive residential development, faces the sewerage plant is without merit. Bendel Gardens has always been identified as a separate entity entirely from the South College Drive neighborhood and/or the Greenbriar area. Thus, the City's refusal to rezone the plaintiff's property amounts to a denial of all practical use of his property for development.

Plaintiff has carried his burden of proof. Neither party has established that the denial of rezoning of the Hernandez property bears a substantial relation to the promotion of the health, safety, morals or general welfare of the City of Lafayette. The only benefit shown was that of a lower price to be paid by the City when the Hernandez property was expropriated. We find the facts of this case substantially on point with the facts of *Plebst v. Barnwell Drilling Co.*, 243 La. 874, 148 So.2d 584. No one act by the

City Council or the Mayor would have been sufficient to demonstrate a confiscatory scheme or an attempt to win a lawsuit by political maneuvers. However, the repeated denial of rezoning the Hernandez property, combined with the City's experts advising the passage of the requested zoning change and the statements made by the Council members themselves clearly show a scheme by which Mr. Hernandez's rights were denied. The power of a municipality to expropriate and the regulatory zoning functions performed by a political subdivision are entirely separate functions and should be kept so. The evidence in this case is clearly to the contrary.

Therefore, the Court grants the relief requested by the plaintiff and finds that the property should be rezoned to B1O.

All costs of these proceedings are to be borne by defendants.

An appropriate judgment conforming hereto will be signed upon presentation.

THUS DONE AND SIGNED in Chambers at Crowley, Acadia Parish, Louisiana this 9th day of June, 1980.

/S/ illegible

DISTRICT JUDGE

CERTIFICATE

I certify that a copy of the above and foregoing has been mailed to each attorney of record on this 10th day of June, 1980.

_____

Secretary

IN THE THIRD CIRCUIT COURT OF APPEAL

FOR THE STATE OF LOUISIANA

JAMES E. HERNANDEZ, Appellant
VERSUS NUMBER 8098
CITY OF LAFAYETTE, CITY
COUNCIL OF LAFAYETTE, Appellees

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that JAMES E. HERNANDEZ, the appellant aboved named, hereby appeals to The Supreme Court of the United States from the final judgment of the Third Circuit Court of Appeals for the State of Louisiana, which judgment dismissed appellant's suit against appellees seeking declaratory and injunctive relief from the maintenance of a zoning ordinance affecting appellant's property which deprived petitioner of his rights to due process and just compensation guaranteed him under the Fifth and Fourteenth Amendments to the Constitution of the United States. Said judgment reversed the judgment of the Fifteenth Judicial District Court in and for the Parish of Lafayette, State of Louisiana. Said judgment was rendered by the Third Circuit Court of Appeal on March 26, 1981. Appellant's timely application for rehearing in that Court was filed on April 23, 1981 and denied on May 8, 1981. The judgment became a final judgment or decree rendered by the highest court of the State of Louisiana in which a decision could be had and therefore appealable to The Supreme Court of the

United States on June 22, 1981 when the Louisiana Supreme Court denied appellant's timely Application for Writs of Certiorari or Review filed on June 5, 1981.

This appeal is taken pursuant to the provisions of 28 U.S.C. Section 1257(2).

ONEBANE, DONOHOE, BERNARD, TORIAN, DIAZ, MCNAMARA & ABELL
(A Professional Law Corporation)

By: _____
JOHN G. TORIAN, II

By: _____
MICHAEL G. DURAND
P.O. Drawer 3507
Lafayette, La. 70502
(318) 237-2660
Attorneys for James E. Hernandez, Appellant

AFFIDAVIT OF SERVICE

BEFORE ME, the undersigned Notary, personally came and appeared MICHAEL G. DURAND, who did declare and say that a copy of this Noticeof Appeal to The Supreme Court of the United States has been this date mailed to opposing counsel, Mr. Charles K. Siemon, One IBM Plaza, Suite 3100, Chicago, Illinois 60611 by depositing same in a United States post office mailbox, first class postage prepaid.

SWORN TO AND SUBSCRIBED before me, Notary, this 22nd day of July, 1981.

/S/ illegible
_____
NOTARY PUBLIC IN AND FOR THE PARISH OF LAFAYETTE, STATE OF LOUISIANA

PERTINANT PORTIONS OF THE ZONING ORDINANCE OF THE CITY OF LAFAYETTE, LOUISIANA

ORDINANCE O-191

AN ORDINANCE to amend and re-enact Ordinance 927, Commission Form of Government Series, City of Lafayette, Louisiana and all zoning ordinances preceding same, as amended, entitled:

> "AN ORDINANCE ZONING CERTAIN SECTIONS OF THE CITY OF LAFAYATTE, LOUISIANA, ESTABLISHING PENALTIES FOR THE VIOLATION OF SAID ORDINANCE AND REPEALING ALL ORDINANCES IN CONFLICT THERE WITH:"

so as to change and amend the old regulations and districts and define and set up new regulations and districts in order to regulate and restrict the size of all buildings and other structures, the percentage of lot that may be occupied, the size of yards and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence, or other purposes and for) said purposes divide the City into districts; to regulate and restrict the erection, structural alterations or use of buildings or land therein; to provide for the change of such regulations, restrictions and boundaries of zones; to provide for enforcement and penalties for the violation of its provisions; all in accordance with and under the authority of the provisions of the Revised Statutes of 1950, Title 33; Section 4721 through 4730.

WHEREAS, the City Council of the City of Lafayette, Louisiana, deems it necessary in order to lessen congestion in the public streets, to secure safety from fire, to promote health, safety and morals, and the general welfare, to provide adequate light and air; to avoid undue concentration of population; to facilitate adequate transportation, water supply, sewerage, schools, parks, and other public requirements; to conserve the value of buildings and encourage the most appropriate use of land throughout the City in accordance with a comprehensive plan;

BE IT ORDAINED, by the City Council of the City of Lafayette, Louisiana, in regular session convened, that Ordinance 927, Commission Form of Gvernment Series, City of Lafayette, Louisiana, and all zoning ordinances preceding same, as amended, be and the same are hereby amended and re-enacted so that as amended and re-enacted the same shall read as follows, to wit:

ARTICLE I - SHORT TITLE

This Ordinance shall be known, referred to, and recited as the 1971 Zoning Ordinance, as amended.

ARTICLE III - ESTABLISHMENT OF DISTRICTS

SECTION 1 - LIST OF DISTRICTS: For the purpose of promoting the public health, safety, morals, and general welfare of the community, the City of Lafayette is hereby divided in the following districts:

R-1A - Single-Family Residence (8,500 square feet per dwelling unit)
R-1B - Single-Family Residence (7,000 square feet)
R-1C - Single and Two-Family Residence (4,500 and 5,000 square feet respec - tively)
R-2 - Multi-Family Residence
R-3 - Mobile Home Park District
R-4 - Condominium and Town House District
R-1-M- Business District (Medical)
R-1-O- Business District (Office)
B-N - Neighborhood Business District
B-T - Transitional Business District
B-G - General Business District
C-B-D- Central Business District
I-1 - Light Industrial District
I-2 - Heavy Industry

SECTION 2 - SPECIAL DISTRICTS: The zoning districts appearing below are special in that they are created as needed by the amendment procedure as set forth in this Ordinance and require approval by the Commission.

B-1-O Office District - This type of district is designated to allow property in trasitional areas and other areas to be used for the provision of office space. For the purpose of this section, a transition area is defined as one which lies between a district zoned for commercial use and one zoned for residential use. A district of this type is special in that it is to be created as needed through the amendment procedure as set forth in this ordinance upon petition of the property owner. A zoning classification of this type shall not be granted unless the site plan meets with the approval of the City Planning Commission or its designated agent. Although

the use of the B-1-O Office District Classification is not limited to transitional areas, its use in those areas is encouraged inasmuch as to it serves as an ideal buffer between the residential and commercial or business classification.

a. Permitted Uses

1. Offices for the purpose of rendering professional and Semi-professional client oriented services. All retail and whole sale activities which require the receiving, stocking, storing, displaying, manufacturing, selling, or renting of merchandise or equipment is expressly prohibited. All services shall be rendered within offices and use of any portion of the outside area for the performance of services shall be expressly prohibited.

b. Area and Yard Requirements

1. Minimum Lot Area - none
2. Minimum Yard Requirements

a. Front Yard - 20 feet
b. Rear Yard - 20 feet
c. Side Yard - 20 feet

Said yard requirements shall be met with the exception that where rear and side yards of the property in question abut a commercially zoned district the respective yard requirements of said commercially zoned district may be used.

3. Open Space

a. Open yard space must equal 20% of the lot area with the remaining 80% reserved for building(s), driveways, and parking with the exception that 10 feet of the required front, side and/or rear yards may be used for parking pro-

vided that a 10 foot planted green area is maintained between the property in question and adjacent property. For the purposes of this section, a planted green area shall be defined as one which is sodded and planted with grass, shrubs, or trees which shall be maintained in a manner not obstructing sight distance for vehicles entering or leaving the parking area.

4. Parking
   a. One parking space totaling 200 square feet shall be provided for every 200 square feet of building area.

5. Signs
   The building containing the offices may be identified by no more than two signs. Only one sign shall be displayed on any given side of the building. Said signs shall be displayed flat against the building, shall not be free standing and neither sign shall exceed eight (8) square feet in area. Self-illuminated signs are expressly prohibited.

ARTICLE V - SCHEDULE OF ZONING DISTRICT REGULATIONS

The Schedule of regulations and the notes appended thereto, included herewith, applying to the uses of land and building, the height of buildings, the coverage of lots, the yards and other open spaces, and all other open spaces to be provided contiguous to or in connection with buildings, the area of lots, off-street parking spaces, and all other matters contained therein, as indicated for the various districts established by this Ordinance, are hereby adopted and declared to be a part of this Ordinance and may be amended in the same manner as any other part of this Ordinance. The regulations listed for each district as

designated, reading from left to right across the schedule, and in all notes appended thereto, are hereby adopted and prescribed for such district, subject to the provisions of Articles V and VI of this Ordinance, and unless otherwise indicated, shall be deemed to be the minimum requirements in every instance of their application.

ZONING DISTRICT:

R-1A Single-Family Residence

PERMITTED USES:

Acessory use, art gallery or museum, church (including associated uses), condominium, day nursery, dwelling (single-family), electric substation, farming (on five acres or more), fire station, gas regulator station, golf course (except driving range, pitch and pull or miniature golf course), home occupation, kindergarten, library or reading room, nursery (horticulture), parks and playgrounds, pipeline or electric transmission line, railroad right-of-way, recreational facility (privately owned and operated including individual and community swimming pools, tennis clubs, non-commercial community centers and similar uses), schools (elementary, secondary, public, and private (including associated uses and structures), sewer pumping station, telephone exchange, town house, water pumping station, water storage.

MINIMUM LOT AREA:

8,500 square feet per dwelling unit

MINIMUM YARD REQUIREMENTS:

Front - 20 feet
Side - 5 feet per side
Rear - 10 feet
Open - Open yard space must equal fifty percent of lot area with remaining fifty percent reserved for building(s) and parking. Open space shall be at least partially

planted in grass or other plantings.

ZONING DISTRICT:
R-2 Multi Family Residence

PERMITED USES:
Same as R-1C plus boarding house, club or lodge (private), college or university dormitory, dwelling (multi-family), fraternity or sorority house, storage garage, and tourist home.

MINIMUM LOT AREA:
4,500 square feet per dwelling for single-family residences.
5,000 square feet per dwelling for two-family residences.
For multi-family dwellings, 4,000 square feet for first two units plus 500 square feet for each additional unit.
For condominiums and Townhouses, 3,000 square feet per dwelling unit.

MINIMUM YARD REQUIREMENTS:
Front - 20 feet
Side - 5 feet per side
Rear - 10 feet
Open - For single and two family residences, open yard space must equal thirty percent reserved for building(s) and parking. For multi-family residences, condominiums, and town houses, open yard, space must equal twenty percent of lot area with remaining eighty perceant reserved for building(s) and parking. Open space shall be a least partially planted in grass or other plantings.

ZONING DISTRICT
B-1-M Business District (Medical) (Special)

PERMITTED USES:
Professional offices - dentists, physicians, psychiatrist, physiotherapists, surgeons, or practitioners in related specialities, clinics-dental or optical; laboratories - dental, medical or optical.

MINIMUM LOT AREA:
None

MINIMUM YARD REQUIREMENTS:
Front - 20 feet
Side - None
Rear - None
Open - Open yard space must equal twenty percent of lot area with the remaining eighty percent reserved for building(s), and parking. Open space shall be at least partially planted in grass or other plantings.

ZONING DISTRICT:
B-1-O Office District (Special)

PERMITTED USES:
Offices for the purpose of rendering professional and semi-professional client oriented services. All retail or wholesale activities which require the receiving, stocking, storing, displaying, manufacturing, selling, or renting of merchandise or equipment is expressly prohibited. All services shall be rendered within offices and use of any portion of the outside area for the performance of services shall be expressly prohibited.

MINIMUM LOT AREA:
None

MINIMUM YARD REQUIREMENTS:
Front - 20 feet

Side - 20 feet
Rear - 20 feet
Side - Open yard space must equal twenty percent of the lot area with the remaining eighty percent reserved for building(s), driveways and parking with the exception that ten feet of the required front, side and/or rear yards may be used for parking provided that a ten foot planted area is maintained between the property in question and adjacent property. For the purposes of this section a planted green area shall be defined as one which is sodded and planted with grass, shrubs, or trees which shall be maintained in a manner not obstructing sight distance for vehicles entering or leaving the parking area.

ARTICLE XI — AMENDMENTS AND PETITIONS

SECTION 1 - INITIATION OF AMENDMENTS: The City Council may, from time to time, amend, supplement, or change the regulations, restrictions, or boundaries herein or subsequently established. Such amendment, supplement, or change may be initiated:

1. By action of the City Council itself by introduction of an ordinance or by adoption of a motion.

2. By recommendation of the Planning Commission.

3. By Petition of property owners.

Such amendments shall be effective only if the prescriptions as set forth herein are subscribed to.

SECTION 2 - FINAL REPORT FROM ZONING COMMISSION REQUIRED: The City Council shall take no

amendatory action nor shall any amendment to this ordinance be effective until the City Council has received the final report of the Zoning Commission. Said report shall contain the recommendation of the Commission relative to the amendment and its reasons for making such a recommendation. The report shall be filed with the City Council within forty-five (45) days after the date of the public hearing held to consider the amendment. Failure to do so shall constitute cause for the City Council to take action on the amendment independent of the receipt of the final report.

SECTION 3 - PUBLIC HEARING REQUIRED: The Zoning Commission shall not file a report recommending amendments to this ordinance, nor shall the City Council take amendatory action, nor shall any amendment be effective unless the commission has held a public hearing upon the proposed amendment at which parties in interest have an opportunity to be heard. Said hearing may be called by the Zoning Commission upon its own initiative; additionally it shall be called upon direction of the City Council or upon receipt of a petition from a property owner.

SECTION 4 - NOTIFICATION OF PUBLIC HEARING REQUIRED: No public hearing shall be held to consider a proposed amendment to this ordinance unless notification of said hearing is given in accordance with the prescriptions set forth as follows:

A. *Hearing to Consider Proposed Amendment Initiated by the City Council or the Zoning Commission.* Notice of the time and place of a hearing called to consider a proposed amendment of this ordinance initiated by the Zoning Commission or the City Council shall be published once a week in three different weeks in the official journal of the City of Lafayette and at least fifteen (15) days shall elapse between the first publication and date of the hearing.

B. *Hearing to Consider Proposed Amendment In-*

itiated by Petition of a Property Owner. Notification of a hearing to consider an amendment to this ordinance by a property owner must be given as follows:

1. Notice of the proposed change and of the time and place of the hearing shall have been published once a week in three different weeks in the official journal of the City of Lafayette. At least fifteen (15) days shall be elapse between the first publication and the date of the hearing.

2. Notice of the proposed amendment and the time and place of the hearing shall have been mailed at least fifteen (15) days before the public hearing to each property owner within five hundred feet (500 ft.) from the boundaries of the area of the proposed change.

3. A sufficient number of printed notices in bold type shall be posted for not less than fifteen (15) days prior to the hearing before the Commission, on signs not less than one square foot nor more than two (2) square feet in area on the property proposed for a change in Zoning Classification. Said signs shall contain an accurate statement of the proposed change and also the time and place of the public hearing.

SECTION 5 - PROCEDURE FOR FILING PETITION: A petition by a property owner for an amendment to this ordinance shall be filed with the City Council through the Zoning Commission. In filing such a petition, the following prescriptions shall apply:

A. Hearings on petitions for amendments to this ordinance will be held at least three times yearly. Dates of said meetings will be at the discretion of the Lafayette City Zoning Commission.

Action will be taken on petitions which; have been filed at least sixty (60) days prior to the date of a scheduled hearing. (This paragraph reads as amended, effective October 9, 1978).

B. No petition for an amendment to change a zoning classification shall be filed unless such petition is duly signed and acknowledged by the owner, or authorized agents of not less than fifty (50) percent of the area of land for which a change of classification is requested provided, however, that where any lot located in the aforesaid area is owned in division, all co-owners must sign the petition for that lot to be included in the fifty (50) percent area provision.

C. Each petition for a change in the classification of property shall be accompanied by six copies of a map, drawn to an approximate scale of one inch equals fifty feet, showing the dimensions of each ownership within the area of the proposed change and within five hundred feet radius of the proposed change. There shall also be submitted a list showing the name and address of each property owner within the area shown on the map. Additionally, the petitioner shall furnish a copy of subdivision covenants, if any, affecting the property under consideration for reclassification and he shall certify that said covenants are current and in effect at the time of filing.

D. Each petition shall be accompanied by a deposit of twenty-five dollars for each text change in the ordinance not involving acreage and five dollars for each acre of land and portion thereof (maximum $250 - minimum $25) for which a change of classification is proposed or recommended. Under no conditions shall said sum or any part thereof be refunded for failure of said change to be adopted by the City Council. The petitioner shall also pay the direct cost

of signs, advertising and the cost of transcript of the hearing to writing of all testimony given at the public hearing held by the Zoning Commission.

E. Whenever a petition is filed requesting an amendment to the ordinance, and said petition has been finally acted upon by the City Council, or when said petition has received no action on the part of the City Council within ninety (90) days, or when said petition has been officially advertised for public hearing but has subsequently been withdrawn either before or after said hearing has been held, then the City Council shall not consider any further petition requesting or proposing such change or amendments for the same property within a period of two calendar years from the date of the City Council's final legal action on said petition or from the expiration of the aforesaid ninety day period in case action has not been taken by the City Council, or from the date withdrawal of said petition providing, however, that said petition has been officially advertised. This provision shall not apply in cases where the City Council wishes to consider a comprehensive zoning revision of an area larger than twenty acres.

SECTION 6 - AMENDATORY ACTION BY THE CITY COUNCIL WITHIN NINETY (90) DAYS FROM RECEIPT OF FINAL REPORT: If the City council decides to amend this ordinance it shall do so within ninety (90) days from the date upon which the Zoning Commission files the final report with said Council.

Opposition

No. 81-600

Office - Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES E. HERNANDEZ, APPELLANT

v.

THE CITY OF LAFAYETTE, LOUISIANA AND THE CITY COUNCIL OF LAFAYETTE, LOUISIANA, APPELLEES.

ON APPEAL FROM THE THIRD CIRCUIT COURT OF APPEAL IN AND FOR THE STATE OF LOUISIANA

MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE THIRD CIRCUIT COURT OF APPEAL IN AND FOR THE STATE OF LOUISIANA

MOTION TO DISMISS OR AFFIRM

Appellees, the City of Lafayette, Louisiana, and the City Council of Lafayette, Louisiana, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move this Court to dismiss the appeal herein and/or affirm the judgment of the Third Circuit Court of Appeal of the State of Louisiana on the ground that the questions presented are so unsubstantial as to not warrant further argument.

ADDITIONAL STATEMENT OF THE CASE

Contrary to Appellant's hyperbolic version of the case which is presented at pages 5-14 of his Jurisdictional Statement, this cause involves nothing more than a challenge to the validity of the City of Lafayette's zoning ordinance as applied to

Appellant's property. Appellant himself framed the issues in his Complaint and alleged that the City's failure to rezone his property (the practical effect of which was to leave intact a residential classification that permits up to 85 dwelling units on his property) was unconstitutional. The Third Circuit Court of Appeal for the State of Louisiana, however, found that under established principles of zoning jurisprudence the record contained evidence that the existing zoning classification did bear a substantial relationship to the public health, safety and welfare and preserved to Appellant an economically beneficial use of his property. Appellant petitioned the Third Circuit Court of Appeal for a rehearing *en banc,* which was denied on May 8, 1981. Appellant's application for writ of certiorari or review was denied by the Supreme Court of Louisiana on June 22, 1981. *Hernandez* v. *City of Lafayette,* 399 So. 2d 1179 (La. App. 1981), writ denied, ____ So. 2d ____ (La. 1981).

Appellant's property is a 16.7 acre parcel of land located in the City of Lafayette which is zoned R-1-A and has been so zoned for 17 years. Property to the north, east, south, and west of the subject property is also zoned R-1-A. To the northwest, across West Bayou Parkway from the narrow fifty-foot neck of the property is a parcel of land zoned R-2 which has been developed into townhouses. The only non-residentially zoned land in the immediate vicinity of Appellant's property is located on the opposite side of South College Road, a six-lane major arterial road and is more than 500 feet from the usuable portion of Appellant's property. *See* Appendix 1 in *Hernandez* v. *City of Lafayette,* 399 So. 2d at 1186, which graphically portrays the zoning in the area.

Appellant's property has an irregular configuration and is bounded on its eastern edge by a fifty-foot wide body of water named the Coulee Mine which serves as a backdrop for a series of spacious single-family residences on lots immediately across the coulee from the subject property. The narrow fifty-foot wide neck of the property which abuts South College Road is

unusable under any zoning classification and the property has no direct access to South College Road because of a bridge at the property line. The subject property is currently improved with two single family residences and has been used for residential purposes for many years.

A municipal sewer plant is located on the parcel of land to the south of the subject property but is visible from only a small portion of the subject property. The sewer plant was constructed prior to most of the development in the neighborhood, including the Appellant's residence. The property is traversed by a series of utility easements that would have to be moved no matter how the property is developed.

According to the evidence in the record, under the R-1-A zoning classification the property has a value of at least $1,000,000, exclusive of improvements. The only expert real estate appraiser who testified as to land value testified that the property, excluding the two homes currently on the property, has a value of $1,180,000 or in excess of $75,000 an acre.

ARGUMENT

A.

THE FEDERAL QUESTIONS RAISED ON APPEAL ARE NOT SUBSTANTIAL

Appellant, of course, asserts that the federal questions presented are substantial and urges plenary review by this Court. Appellees respectfully disagree and pray this honorable Court dismiss the appeal and affirm the judgment of the Third Circuit Court of Appeal of the State of Louisiana. Appellees submit that the questions presented are not substantial and do not merit further review by this Court. Substantiality of a federal question is a somewhat illusive concept that is not amenable to general description; however, one pertinent indicia of a federal question that is not substantial is that the question of federal law involved is well-settled. *See e.g., Zucht* v. *King,* 260 U. S. 174 (1922). Appellees respectfully submit that the jurisprudence of zoning is well-settled by the opinions of this Court and that there is no substantial federal question presented for review in this matter.

The constitutional law of police power regulation over the use of land is well-established. In *Village of Euclid* v. *Ambler Realty Corp.,* 272 U. S. 359, 387-88 (1926) this Court set down an enduring rule of law:

> [Zoning regulations] must find their justification is some aspect of the police power asserted for the public welfare.
>
> * * * * * *
>
> If the validity of the legislative classification be fairly debatable, the legislative judgment must be allowed to control.

See also, *Penn Central Transp. Corp.* v. *New York City,* 438 U. S. 114 (1978). In *Agins* v. *City of Tiburon,* 447 U. S. 255, 260 (1980) this Court rehearsed what are recognized as accepted standards:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow* v. *City of Cambridge,* 277, U. S. 183, 188 (1928) or denies an owner economically viable use of his land, see *Penn Central Transp. Corp.* v. *New York City,* 438, U. S. 104, 138, n. 36 (1978).

More recently in *Schad* v. *Borough of Mt. Ephraim,* ____ U. S. ____, 101 S. Ct. 2176, 2182 (1981) this Court confirmed the established character of the constitutional principles of zoning law:

> Where property interests are adversely affected by zoning the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulations if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property.

In each of the cases cited above the principles of consitutional law controlling the exercise of the zoning power are clear, unambiguous and consistent. There is some question about the nature of the appropriate remedy when a regulation is declared to be overly restrictive, *see e.g. San Diego Gas & Electric* v. *City of San Diego* ____ U. S. ____, 101 S. Ct. 1287 (1981) (Brennan, J., dissenting) but that question in no way undoes the established character of the standards of judicial review in zoning cases.

These established principles of law are the very same legal principles that were applied to facts of this case by the Third Circuit Court of Appeal of the State of Louisiana. Appellees respectfully submit that Appellant's Jurisdictional Statement

does nothing more than challenge the factual determinations made below, and that fact and evidence questions are not "substantial federal questions" under the appellate jurisdiction of this Court.

In his Complaint, Appellant alleged that the repeated refusal of the City of Lafayette to rezone his property in accordance with his wishes did not bear any substantial relationship to the public health, safety and welfare, and in the alternative, deprived him of all beneficial use of his property. Applying the evidence in the record to well-settled zoning jurisprudence, the Third Circuit Court of Appeal for the State of Louisiana held that the City's regulations, as applied to Appellant's property, were valid. The court did not, as Appellant glibly suggests, "declare open season on landowners." To the contrary, the court found that the record contained sufficient evidence to support a determination by the City that the R-1-A zoning classification, as applied to Appellant's property, served the public health, safety and welfare and that the R-1-A classification preserved to Appellant a practical, beneficial use of his property. No matter how unhappy Appellant is with the court's decision and no matter how bitter his language, his Jurisdictional Statement simply does not raise any substantial question of federal law.

The Third Circuit Court of Appeal found that the record contains "substantial evidence" that the property should remain zoned R-1-A, residential, rather than be rezoned under a commercial classification. The court noted that the evidence adduced at trial showed that "rezoning the property to commercial would be incompatible with and have an adverse effect on the surrounding areas." In addition, the court pointed out evidence in the record that development of the property for non-residential uses would produce "unsafe traffic conditions." In further support of its decision, the court cited the zoning history of the vicinity as demonstrating that "since 1963 . . . the City has never waivered in its treatment of the subject proper-

ty." The court also observed that the City's zoning actions have "been uniform in confining commercial and business districts to frontage on the City's arterial road network." 399 So. 2d at 1183-84. The City's denial of the requested rezonings were therefore consistent with the City's land use policies.

B.

THE CITY'S CONDUCT DID NOT DEPRIVE APPELLANT OF HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

Notwithstanding the validity of the R-1-A zoning classification, Appellant argues that he is entitled to a judgment rezoning his property, because the acts of the City of Lafayette were designed to "save expropriation dollars by threatening potential condemnees with blatant abuse of their constitutional protections." (Jurisdictional Statement at page 15) The record in this cause, however, is absolutely clear that:

1. No expropriation of any portion of appellant's property has taken place;

2. There are no current or future plans to expropriate any portion of Appellant's property; and

3. At all times pertinent, Appellant's land, under the existing R-1-A zoning classification, had a value of greater than $1,000,000 (not including the two residences currently developed on the property).

The fact is that Appellant hoped to increase the value of his property by getting his property rezoned, a hope that was denied by the City in favor of the City's perception of the public health, safety and welfare of the citizens of the City of Lafayette. The Court of Appeal of the State of Louisiana sustained the City's position in its opinion. The "record in this case does reveal a valid, objective basis upon which the City of Lafayette could reasonably conclude that retaining the R-1-A zoning classification of the subject property serves the public health, safety and welfare." 399 So. 2d at 1184.

Appellant's protracted comparison of *Robertson v. City of Salem* is, to quote *Robertson* itself, of no "solace." 191 F. Supp. 604, 611 (D. Ore. 1961). In *Robertson* the City of Salem rezoned the landowner's property in order to facilitate its acquisition of governmental buildings. The City defended its action in "holding" the property for state acquisition through "zoning" as serving a legitimate public purpose. In contrast, the City of Lafayette refused to rezone Mr. Hernandez's property to the zoning classification of *his* choice. And more, significantly, the City of Lafayette defended its zoning decision not on the basis of saving expropriation dollars but on the basis of proper planning considerations—neighborhood characteristics, site characteristics, traffic and city-wide policies and impacts, justifications the Third Circuit found to be reasonable under established jurisprudence.

Furthermore, the history of the City's consideration of a roadway improvement which would have gone through a portion of the Appellant's property if implemented is simply irrelevant. Even under the allegations of the complaint, the facts in this case do not rise to the stature of the pre-condemnation proceedings considered and rejected by this court in *Agins v. City of Tiburon*, 447 U. S. 255 (1980). In *Agins* the City of Tiburon had actually commenced condemnation proceedings. In this case, formal proceedings were never commenced, and Appellant himself testified at trial that an alternative plan of street improvements was being implemented by the City.

> Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."

Id. at 263 n. 9 (citation omitted).

Finally, Appellant's illusion of oppression because of the City's consideration of the roadway realignment evaporates when it is noted that the only real estate appraiser who gave value testimony in regard to Appellant's property testified that it was possible that condemnation of a right-of-way through the Hernandez property might cost *more* if the property was zoned R-1-A than if it were zoned B-1-O. This is so because of the availability of severance damages under Louisiana law. If a right-of-way through the property, if it should ever come into existence, would destroy the usefulness of the parcel for R-1-A as Appellant claims, then the value of the entire parcel would be the measure of compensation, while only the right-of-way itself would be acquired if the property were zoned B-1-O.

C.

THE PRESERVATION OF AN ECONOMICALLY VIABLE USE TO APPELLANT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

In the second part of his argument in support of the proposition that the federal questions presented herein are substantial, Appellant reargues the evidence in the record and attempts to persuade this Court to reweigh the evidence. Appellant's argument, of course, ignores the fact that this Court's appellate jurisdiction does not extend to a reweighing of the evidence in review of factual determinations made below. More importantly, Appellant's self-serving version of the record is extremely misleading and can be described, at best, as selective.[1]

---

[1] One example of Appellant's inaccurate portrayal of the record in his reference to the decision of the Fifth Circuit Court of Appeals. (Jurisdictional Statement page 8) The City moved for a judgment on the pleadings in the federal court and the District Court, *taking the well-pleaded allegations of the complaint as true*, granted judgment in favor of the City. The Fifth Circuit recited the same allegations, taken

(Footnote continued on following page.)

Even were it appropriate for this Court to reweigh the evidence, Appellant's argument misses the mark on each of the three theories he advances. Appellant's arguments are that:

1. Appellant's own zoning expert's opinion that his property had a value of $1,000,000 under the R-1-A classification was an unreliable guess;

2. The only real estate expert who testified said property could not be "used" under the R-1-A classification; and

3. The City's expert real estate appraiser's value opinion was "inapplicable."

1.

Appellant's so-called planning expert, who testified that he was a licensed realtor and that land value was a pertinent part of forming an opinion as to proper zoning, opined that the property had a value of $1,000,000 under the existing, R-1-A zoning classification. He substantiated his opinion by testifying that townhouses (permitted on Appellant's property in the R-1-A district) directly across West Bayou Parkway from Appellant's property were selling for $145,000 each. No matter how hard Appellant tries, he cannot escape the fact that the *only* evidence in the record is that the Appellant's property has a value of at least $1,000,000 under the existing residential classification. While Appellant may regret his zoning expert's opinion and may not agree with the estimate, Appellant offered no evidence whatsoever as to the value of his property and is hardly in a position to now complain.

(Footnote continued from preceding page.)

as true for the purposes of the motion, as the "background" of the case on which the issues of law were to be decided. No federal Court has ever characterized the facts in this matter and it is difficult to believe that Appellant's presentation of the Fifth Circuit's opinion as a "characterization of Appellant's plight" is anything more than a calculated attempt to mislead.

2.

As for Mr. Cecil Trahan's opinion that the property could not be used under the R-1-A classification, Appellees respectfully point out a few of the reasons the appellate court may have found Mr. Trahan's opinion less than compelling. First, Mr. Trahan admitted that he had a financial interest in the sale of the property if it could be rezoned to B-1-O. Second, Mr. Trahan's opinion that townhomes could not be marketed on Appellant's property was, he said, just a "feeling," a feeling that is completely contradicted by his admission that townhomes immediately across the street from Appellant's property were selling for $145,000. More importantly, Mr. Gene Cope, a real estate appraiser qualified as an expert, testified that the property had a value of $1,180,000 under the existing classification. That appraisal included Mr. Cope's professional opinion as to the marketability of the property in the City of Lafayette.

3.

Finally, Appellant would have this Court believe that the opinion of Mr. Cope, the City's real estate appraiser, had a "gross defect in his analysis [because] ... [t]he property utilized in Mr. Cope's method of analysis were clearly shown to be totally inappropriate in determining land values on the subject property." (Jurisdictional Statement page 25) It is unnecessary to dwell on the fact that Mr. Cope used two different approaches to value (of which only one was challenged on cross-examination with regard to comparable sales data) because this Court does not sit to reweigh the evidence in the record.

CONCLUSION

WHEREFORE, Appellees respectfully submit that the question upon which this cause depends is so unsubstantial as not to need further argument, and Appellees respectfully move the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Third Circuit Court of Appeal of the State of Louisiana.

Respectfully Submitted,

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